U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: July 1, 1998
Case No: 97-INA-296

In the Matter of:

S.I. Distribution Co.,
Employer,

On Behalf of:

Ki Chang Lee,
Alien.

APPEARANCE: Stuart I. Folinsky
Los Angeles, California
For Employer and Alien

BEFORE: Lawson, Wood, and Vittone,
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien, Ki Chang Lee, ("Alien") filed by Employer, S.I. Distribution Co. ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On October 11, 1994, Employer filed an application for labor certification to enable Alien to fill the position of Secretary, I. (AF 42-98). The job duties are described as follows:

> Answer telephone calls; take messages and answer routine questions from business associates and customers; schedule appointments and maintain calendar; prepare and type routine forms, documents, correspondences, notes, memos, etc. in Korean and English; route mail; greet customers at receptionist's area.

(AF 42). Special requirements included speak, read and write Korean, and the ability to touch-type in English and Korean. *Id*.

On March 14, 1996, the CO issued a Notice of Findings (NOF) proposing to deny the labor certification because the special requirements were unduly restrictive. (AF 36-40). Employer was directed to delete the requirements or justify the requirements on the basis of business necessity.

Employer submitted its rebuttal on April 16, 1996. (AF 9-35). The rebuttal consisted of a letter from Employer's attorney, a declaration by Employer, and copies of letters, price lists, and advertisements.

The CO issued the Final Determination on June 3, 1996, denying labor certification because Employer failed to document the business necessity of the foreign language requirement. (AF 6-8).

On July 8, 1996, Employer requested an administrative review of the denial of labor certification. (AF 2). The CO erroneously treated the request as a request for reconsideration which the CO denied on July 19, 1996. (AF 1). On May 1, 1997, the CO forwarded the application to this Board for review.

DISCUSSION

The regulations at 20 C.F.R. § 656.21 (b)(2)(i)(C) provides that the proposed job opportunity shall not require a language other than English unless that requirement is adequately documented as arising from employer's business necessity. *See Advanced Digital Corporation*, 90-INA-137 (May 21, 1991). The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer adequately document the following: (1) the language requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. The business necessity standard set forth in *Information Industries, supra*, is applicable to a foreign language requirement. *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc*).

Employer operates a distribution company for fish cakes from a U.S.-based Japanese supplier and is the sole distributor of these products to Korean merchants in Southern California. Employer reports that all of its customers are Korean nationals and that all of them speak and write Korean only or prefer to speak and write in Korean. Employer further states that the price lists are in English because they are provided by the Japanese supplier and that Employer attaches cover letters and fliers in Korean with these lists. Additionally, Employer notes that its customers frequently contact Employer for price quotes in Korean. As documentation, Employer submitted copies of client lists (AF 88-92), an advertisement in a Korean business directory, and fliers in Korean translated and notarized (AF 73-87).

On facts very similar to this case, this Board reversed the CO and granted labor certification for a Secretary at an office supply store where 80% of its clients speak Mandarin Chinese. *See Chris & Cary Enterprises/Thrifty Office Supply*, 88-INA-134 (Sept. 3, 1991). In that case, Employer's rebuttal evidence consisted of a letter, client lists, an ad in a Chinese newspaper and invoices. We held that if a significant portion of the employer's business is performed with clients who speak a foreign language, then the first prong of the business necessity test is satisfied. *See also Tel-Ko Electronics, Inc.*, 88-INA-416 (July 30, 1990). In this case, Employer represents that all of its clients either prefer to speak Korean or only speak Korean; even if it is a preference, it is the client's preference, not Employer's preference. *See Alywa Computer Corp.*, 88-INA-212 (Sept. 21, 1989).

In regards to the second prong, in *Chris & Cary Enterprises/Thrifty Office Supply, supra*, we found that the job duties of communicating with customers, handling mail and telephone calls, and scheduling appointments were sufficient to establish that the employee's job duties require communicating in Mandarin Chinese. In this case, the duties include answering calls, taking messages, answering questions from customers, scheduling appointments, preparing correspondence and documents, and greeting customers. As these duties are essentially identical, Employer has satisfied the second prong of the business necessity test. Therefore, Employer has adequately documented business necessity for the Korean language requirement.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and labor certification is **GRANTED**.

For the panel by:

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.